

No. 79-129

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1978

MILLETTE & ASSOCIATES, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The sole question presented in this federal income tax case is whether the decision below correctly held that petitioner was not entitled to have its tax liability for 1972 determined on a consolidated basis with its subsidiary because it had failed to file a timely consolidated income tax return.

The pertinent facts are undisputed and may be summarized as follows: Petitioner is a corporation which, since May 15, 1972, has owned 80% of the outstanding stock of Millette Enterprises, Inc. (Pet. App. A-21). During 1972, petitioner's shareholders and officers discussed with their accountant and tax attorney the possibility of filing a consolidated corporate income tax return for petitioner and Enterprises for the taxable year

(Pet. App. A-23 to A-24). As a result of these discussions, a consolidated return was prepared (Pet. App. A-24). Although the return was due to be filed by March 15, 1973 (Pet. App. A-29), the Internal Revenue Service did not receive it until May 9, 1975 (Pet. App. A-24). On audit, the Commissioner of Internal Revenue determined that petitioner was not entitled to have its income computed on a consolidated basis with that of Enterprises because it had failed to comply with Treasury Regulations on Income Tax, Section 1.1502-75(a)(1) (26 C.F.R.), which requires a group exercising the privilege of filing a consolidated return for the first time to file such return not later than the due date of the return for the common parent (Pet. App. A-27 to A-28). The Tax Court upheld the Commissioner's determination (Pet. App. A-32 to A-33), and the court of appeals affirmed (Pet. App. A-15).

I. Petitioner urges (Pet. 11-19) that it was unconstitutional for Congress to have delegated to the Commissioner of Internal Revenue the authority to prescribe regulations with respect to the making of consolidated returns. See Section 1502 of the Internal Revenue Code of 1954 (26 U.S.C.). But the validity of the Treasury Regulations governing consolidated income tax returns has long been recognized. *Ilfeld Co. v. Hernandez*, 292 U.S. 62, 65 (1934); *Woolford Realty Co. v. Rose*, 286 U.S. 319, 330-331 (1932); *S. Slater & Sons, Inc. v. White*, 119 F. 2d 839, 845 (1st Cir. 1941). Since the judiciary's inquiry in cases concerning such regulatory prescription "begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner" (*United States v. Correll*, 389 U.S. 299, 307 (1967); see *National Muffler Dealers Ass'n. v. United States*, No. 77-1172 (Mar. 20, 1979), slip op. 5), there is no basis for petitioner's constitutional challenge.

2. Petitioner further contends (Pet. 24-31) that it was denied equal protection of the law because the court of appeals reached a result different from that of the Tax Court in *Daron Industries, Inc. v. Commissioner*, 62 T.C. 847 (1974). But the Equal Protection Clause does not "assure uniformity of judicial decisions." *Beck v. Washington*, 369 U.S. 541, 554 (1962), quoting *Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106 (1920). As the court of appeals correctly noted (Pet. App. A-8 to A-13), *Daron* is not only factually distinguishable from this case, it also involved a different Treasury Regulation than is involved here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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